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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LYNN FRANCIS BRANCH, Defendant and Appellant.	G042865 (Super. Ct. No. 09CF1510) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed in part as modified and reversed in part.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, A. Natasha Cortina and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Lynn Francis Branch of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a); all further statutory references are to this code unless otherwise stated; count 1), driving with a blood alcohol content of 0.08 percent or greater (§ 23152, subd. (b); count 2); and driving with a suspended license (§ 14601.2, subd. (a); count 3). In a bifurcated trial, the court found true defendant had three prior convictions for driving under the influence within the last 10 years (§ 23550.5, subd. (a)) and three prior convictions resulting in imprisonment (Pen. Code, § 667.5, subd. (b)). It sentenced her to three years in prison on count 1 plus three consecutive one-year terms for each of the prison priors and stayed a three-year term on count 2 under Penal Code section 654. As to count 3, it imposed a 230-day sentence in county jail but awarded defendant the same amount of credit for time served under Penal Code section 4019.

Defendant contends there was insufficient evidence to support count 2 and that the amendment to Penal Code section 4019 applies retroactively, entitling her to additional conduct credits. We agree. The conviction on count 2 is reversed and the judgment is modified to increase defendant's Penal Code section 4019 credits. In all other respects, the judgment is affirmed.

FACTS

Around 10:20 a.m., an intoxicated man on the premises of a senior center where Marilyn Esposito worked told her that defendant had brought him there. Esposito called the police after seeing defendant in the parking lot exhibiting signs of intoxication, including bloodshot eyes, unsteady gait, and erratic driving. She watched as defendant drove her van from a parking stall to the front of the facility where she picked up the

intoxicated man, then through the parking lot making numerous stops and starts before finally making her way to an exit and leaving the center.

Police found defendant around 11:15 a.m. in a parking lot sitting in the driver's seat of her van. She had an odor of alcohol on her breath, droopy bloodshot eyes, and slurred speech and performed poorly on field sobriety tests. Defendant admitted driving the van and having had one drink of juice and vodka at 5:30 a.m. but denied any additional drinks.

Officers arrested defendant and a blood sample taken at 2:00 p.m. showed her blood alcohol content was 0.32 percent. A forensic scientist testified that level of alcohol concentration in a female weighing the same as defendant meant she would have had "between 10 and 11 standard drinks in her system at" the time of testing. Using the average elimination rate of .015 percent per hour, he opined that if the blood sample was taken at 2:00 p.m., that same person would have had "between 11 and 12 standard drinks in her system" two hours earlier, assuming she had not consumed more alcohol during those two hours. At 12:30 p.m., that person would have had "between a .34 and a .35" blood alcohol level.

During cross-examination, the forensic scientist testified he was not provided with sufficient information to calculate the person's blood alcohol content at 10:00 a.m. if the blood sample was taken at 2:00 p.m. Even assuming the person had stopped drinking around 10:00 a.m. and had a 0.32 blood alcohol level at 2:00 p.m., he "wouldn't really be able to estimate with any certainty" what the blood alcohol level would have been at 10:00 a.m. because of the "large gap of time."

DISCUSSION

1. Section 23152, Subdivision (b)

Defendant contends the evidence was insufficient to establish that she drove her vehicle with a blood-alcohol level of .08 percent or more as charged in count 2. We agree.

To convict defendant on count 2, the prosecution had to prove she drove a vehicle with a blood-alcohol level of .08 percent or more. (*People v. Beltran* (2007) 157 Cal.App.4th 235, 240.) Section 23152, subdivision (b) contains a rebuttable presumption that allows a jury to infer a defendant drove a vehicle with a blood-alcohol level of .08 percent or more if a blood sample taken within three hours of driving registers at .08 percent or more. The presumption does not apply in this case because the blood test showing defendant's blood-alcohol level to be .32 percent was taken over three hours after Esposito saw her driving.

Citing *People v. Warlick* (2008) 162 Cal.App.4th Supp. 1, the Attorney General argues that section 23152, subdivision (b) does not require the rebuttable presumption "or any other particular type of evidence[] be admitted to establish proof of a violation of that section." In *Warlick*, the prosecution presented evidence defendant's blood-alcohol content measured within three hours of driving was .07 percent. It also sought to present expert testimony to establish the defendant's blood-alcohol content was at least .08 percent at the time of driving but the trial court ruled the testimony inadmissible and dismissed the charge when the prosecutor admitted inability to establish a section 23152, subdivision (b) violation absent such testimony. Reversing, *Warlick* held: "Where the People introduce evidence of a valid chemical test administered within three hours of the defendant's driving showing a blood-alcohol level of at least 0.08

percent, in the absence of other evidence the trier of fact may infer that the defendant's blood-alcohol level at the time of driving was in excess of the legal limit. The statute simply does not address what can be inferred from a different set of circumstantial evidence, including a 0.07 percent blood-alcohol chemical test result in combination with other facts, which together suggest the defendant's blood-alcohol level was higher at the time of driving." (*People v. Warlick, supra*, 162 Cal.App.4th Supp. at p. 7.)

The other facts relied on by the Attorney General are the forensic scientist's testimony about the average elimination rate of alcohol being .015 percent per hour and how a person's coordination and balance are generally affected by high levels of alcohol; Esposito's testimony as to defendant's unsteady gait and erratic driving; and defendant's statement to police she had not consumed any alcohol since 5:30 a.m. Esposito's testimony and defendant's statement offer no insight on defendant's blood-alcohol level at 10:20 a.m. The testimony of the forensic scientist fares no better. Unlike in *Warlick*, where the prosecution's witness sought to testify the defendant's blood-alcohol level was at least .08 percent at the time of driving, the forensic scientist here was unable to make that determination "with any certainty," irrespective of the average elimination rate. The jury's verdict on count 2 was thus not supported by substantial evidence.

2. Presentence Conduct Credit

The trial court sentenced defendant on November 6, 2009 and awarded her 230 days of presentence custody credits, consisting of 154 actual days in jail and 76 days for good conduct. After defendant was sentenced, the Legislature amended Penal Code section 4019, effective January 25, 2010, to allow offenders convicted of nonserious and nonviolent crimes to earn presentence conduct credit at the rate of two days for every two days in custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Defendant argues

she is entitled to retroactive application of the new law and therefore should receive additional conduct credits. The claim has merit.

Legislative amendments are generally presumed to operate prospectively unless an express declaration exists to the contrary. Because the amendment to section 4019 does not state whether retroactive application is permitted, the Attorney General asserts we must follow the general rule. But in *In re Estrada* (1965) 63 Cal.2d 740, the Supreme Court concluded that when the Legislature amends a statute to mitigate punishment, "the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id*. at p. 748.) The court explained, "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id*. at p. 745.)

For purposes of this rule, courts have traditionally deemed legislative enactments increasing the amount of credits a defendant may accrue as statutes that mitigate punishment. (See, e.g., *People v. Doganiere* (1978) 86 Cal.App.3d 237 [statute involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389 [statute involving custody credits].) The Supreme Court has granted review in a number of cases to resolve a split in authority as to whether the amendment to Penal Code section 4019 is retroactive. (See, e.g., *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.) Until it decides the matter differently, we conclude the amendment to Penal Code section 4019 should be applied retroactively to cases pending on appeal because they effectively reduce the amount of time eligible defendants will spend in prison.

DISPOSITION

The conviction on count 2 is reversed (see *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 72 [when conviction reversed for insufficient evidence, the defendant may assert double jeopardy claim to bar retrial]). The judgment is modified to increase defendant's Penal Code section 4019 credits from 154 days to 308 days. As so modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.